BEFORE THE IDAHO STATE COUNSELOR LICENSING BOARD

* * * * *

In the Matter of a License of:	)	
	)	Case No. 02-93-006-MF
M. ANTHONY HARPER License No. COUN-331	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED DECISION

On February 1, 1994, a hearing was held before the Idaho State Counselor Licensing Board ("Board") pursuant to a complaint which was filed on November 9, 1993, by the Chief of the Bureau of Occupational Licenses alleging that there existed cause for the revocation of Respondent's license pursuant to Title 54 Chapter 34 Idaho Code and the Applicable Rules of the Board.

The State of Idaho was represented by Nicole S. McKay, Deputy Attorney General and the Respondent, M. Anthony Harper, was represented by Samuel A. Hoagland. The hearing was conducted before Wes L. Scrivner, designated hearing officer for the Idaho State Licensing Hearing Board and attending the hearing were the following members of the Board:

1. Jerry Tuchscherer, Chairman.
2. Jan Anderson.
3. Helen Warner.

Board member Barry Watts excused himself from participating in the hearing.

Oral and documentary evidence was presented. At the conclusion of the hearing, counsel stipulated to submit their closing arguments in the form of post-hearing briefs.

Having considered the evidence and the arguments of counsel, the hearing officer submits the following findings of fact, conclusions of law and recommended decision which the hearing officer recommends the Board approve and adopt as its decision and order in this case.

EVIDENCE CONSIDERED

The following documentary evidence was admitted:

State's Exhibits A-J

Respondent's Exhibits 1-14.

The State called the following witnesses:

1. Beatrice Rittenhouse (BR)
2. Timothy Furness
3. Elon Whitlock

The Respondent called the following witnesses:

1. The Respondent
2. Molly L. Parish
3. Jeffrey Pogue
4. Beatrice Rittenhouse

THE COMPLAINT

On November 9, 1993 the Chief of the State of Idaho, Bureau of Occupational Licenses filed a complaint before the Idaho Counselor Licensing Board alleging that the Respondent violated

I.C. § 54-3407(5) and the American Association for Counseling and Developmental Ethical Standards as follows:

1. That during the course of Respondent's therapeutic relationship with BR, Respondent failed to establish a fee structure, including accepting lump sum donations made by BR to Shiloh Counseling Center in excess of monies due for counseling services rendered, in violation of Ethical Standard A(5) and Idaho Code § 54-3407(5);

2. That during the course of Respondent's therapeutic relationship with BR, Respondent engaged in a dual relationship with BR, including accepting monetary gifts totalling $24,500 from BR through Shiloh Counseling Center that were not exclusively for counseling services rendered, in violation of Ethical Standards A(8), A(10), B(13) and Idaho Code §54-3407(5);

3. That during the course of Respondent's therapeutic relationship with BR, Respondent engaged in a dual relationship with BR, including engaging in a personal relationship with BR in violation of Ethical Standard B(13) and Idaho Code § 54-3407(5).

FINDINGS OF FACT

Respondent obtained his bachelor's degree in liberal arts from the University of the State of New York in 1984, thereafter obtained a master's degree in general and guidance counseling from the College of Idaho in 1986, has completed post graduate work, and is currently a Ph.D. candidate in psychology through a correspondence program at California Coast University in Santa Ana, California. Following his graduation from high school, and

prior to his college studies, Respondent had a troubled life and had difficulty with substance abuse.

Respondent was issued a license by the Idaho State Counselor Licensing Board under License No. COUN-331 and is currently a licensed counselor engaged in private practice in Boise, Idaho. The Respondent operates his counseling service through Shiloh Counseling Center, Inc. a non-profit Idaho Corporation (Shiloh). The Respondent is the primary, if not exclusive provider of counseling services for Shiloh, even though other counselors have provided services through Shilo in the past. There was no evidence that other counselors are currently employed by Shiloh.

Respondent began offering counseling services through Shiloh in 1987 and that has been his primary source of income ever since.

Shiloh and the Respondent, are, for all practical purposes the same entity. Respondent is not paid a set salary, although a flat $2,000 monthly salary was apparently contemplated by the directors or members of the non-profit corporation. There has never been sufficient revenue in the corporation to pay the $2,000 salary, and Respondent has received whatever funds are left after Shiloh's operating expenses are paid. There is no principled way to distinguish between the operation of the corporation and the Respondent, Shiloh being formed essentially for tax reasons to operate as a non-profit entity, offering counseling services through counselors in its employ, with Respondent being the primary employee.

Shiloh has not been financially successful and Respondent testified that Shiloh owes him over $90,000 in salary, the difference between the contemplated $2,000 salary per month and actual money received by Respondent. It is interesting that in light of the alleged salary arrearage owing to Respondent on January 4, 1994, Shiloh made a gift of $14,750 to Respondent, representing the value of the van purchased for Respondent by BR, which is discussed later.

The American Association for Counseling and Developmental Ethical Standards apply to Shiloh as well as Respondent, which Respondent conceded at the hearing.

Respondent offers counseling services to the public, and has no fee schedule or structure whatsoever. Respondent's income depends on contributions or "donations" to Shiloh from his clients. The client is informed that he or she may pay whatever the client wishes, without regard to the prevailing rate for counselors or the client's ability to pay. All monies received from clients are considered by Respondent to be donations or gifts to the non-profit corporation. Respondent offers counseling services to individuals who may not be able to pay anything for the service.

The Respondent's only client who testified at the hearing was BR, called as a witness by both the State and the Respondent. In December 1991, BR consulted Respondent for the first time, and the relationship of counselor-client was then established. The Respondent's compensation method was explained to BR at that

time, and she stated that she could pay Respondent $25 for each one hour session (which were then contemplated to be weekly), and Respondent indicated the amount was acceptable. Contrary to Respondent's testimony and argument that he has no fee structure, the $25 per hour agreement was a fee structure with BR at that time. The prevailing rate for licensed counselors is $70 per hour.

In January 1992, BR increased her payment for counseling sessions to $50; however, the frequency and length of the sessions increased dramatically.

Initially, the counseling sessions were weekly. On January 3, 1992, BR was admitted to Intermountain Hospital in Boise on an inpatient basis, and at that time had seen Respondent in two counseling sessions. During this admission, Respondent visited BR in the hospital. Following her discharge from Intermountain, BR saw Respondent at his office. After one of these sessions, Respondent called her at home and suggested that the counseling sessions be held daily, including Saturday and Sunday. In approximately mid-January, the daily sessions began; initially they lasted for one hour, then increased to two hours, and some sessions lasted the entire day. On at least two occasions, Respondent took BR to lunch, and on one occasion took her to dinner. In the course of one of the all day sessions, Respondent accompanied BR to her home and, against her wishes, entered her home. The daily sessions lasted approximately six weeks. On approximately March 18, 1992 BR had what she described as a

collapse at work, and was subsequently re-admitted to Intermountain Hospital.

BR's payments to Respondent increased dramatically beyond the $25 and $50 per session payments. As will be detailed herein, the contributions to Respondent increased from payments per session, to lump sum payments as follows:

February 3, 1992	$ 3,500
March 3, 1992	$ 4,000
March 5, 1992	$17,000
June 8, 1992	$ 800
Total	$25,300

The $25,300 represents payments from BR to Respondent in addition to the $25 or $50 session payments which were agreed on at the commencement of the counseling relationship.

The manner and justification for the payments is vital in understanding the ethical concerns presented in this case.

The February 3, 1992 payment of $3,500.

In December 1991, at the time the professional relationship was established between BR and Respondent, Respondent explained to BR that his business was in financial difficulty, and that he may not be able to continue as a counselor on a long term basis. Respondent informed BR, sometime between December 1991 and February 3, 1992, the number of times is unclear, that he was several months behind in his office rent, phone bill and his personal apartment rent. There was conflicting testimony as to whether Respondent volunteered his financial doldrums or whether

the disclosure was in response to inquiries from BR; however, the disclosures were made and it is largely irrelevant whether BR asked or not. On February 3, 1992 BR gave Respondent a check for $3,500. None of this payment was for counseling services. BR made this payment to Shiloh so that Respondent could pay his business and personal obligations. There was obviously some urgency to paying the bills as soon as possible, for after receiving BR's personal check for $3,500 dated February 2, 1993, Respondent went to her bank the next day and obtained a cashier's check so that he could pay the bills "that day". The cashier's check was made payable to Shiloh.

The March 3, 1992 payment of $4,000.

BR paid Respondent $4,000 by personal check on March 3, 1992. Respondent had explained to BR that he had a federal income tax arrearage dating back to 1987, in the approximate amount of $2,000. BR then offered to pay this personal obligation of Respondent, and Respondent requested that the payment be $4,000, not $2,000 because he had other obligations. BR acquiesced and paid $4,000. None of this money was for counseling services.

As to both the payment of $3,500 on February 3rd and the payment of $4,000 on March 3rd, BR was thus led to believe, whether intentionally or not, that Respondent needed to increase the "donations" in order to stay in business due to the Respondent's disclosure of his financial predicament made during counseling sessions. Respondent denied that he pressured BR in

any way to make contributions. But viewed from the perspective of the client, which Respondent has yet to comprehend and certainly has not acknowledged, BR was under the impression that her counselor would not be available unless she provided financial assistance.

The March 5, 1992 payment of $17,000.

This payment was made to Respondent so that he could purchase a new vehicle. BR thought that Respondent needed a new van since, as BR testified: "He needed a van because he goes on the road singing and needs a place to carry his sound equipment." Again, any distinction between Shiloh and Respondent is artificial and meaningless, since the check was made payable to Shiloh, but clearly intended to purchase the van for Respondent, as after the check was written payable to Shiloh, Shiloh then gifted the van to Respondent. The van actually cost $14,750.11, and the difference of $2,249.89 was apparently used for Respondent's personal or business expenses. None of the $17,000 was for counseling services. BR thought initially that the van could have been purchased for between six and eight thousand dollars. Respondent went shopping and indicated to BR that the price would be around $13,000, but then called her again the same day and requested another $4,000, whereupon BR obtained the $17,000.

BR testified that the van purchase was her idea. Certainly Respondent had an active role in determining which van would be purchased and for what amount. Whether or not Respondent

pressured her, or whether it was an act of benevolence on the part of BR is not totally clear, but either way, or even if there is another explanation, it pointedly demonstrates the inherent difficulty for the client and counselor when there is a dual relationship, and where the counselor brings personal issues into the counseling relationship.

The June 8, 1992 payment of $800.

BR testified that the counseling relationship was terminated in March, 1992; however, the evidence is to the contrary and is underscored by Respondent's admission that a counseling relationship still exists.

This payment was made at the time BR was seeing Respondent in June, as appears from Respondent's progress notes, concerning BR's trip to Alaska. It is unclear whether or not the $800 was for counseling services. Accordingly, of the $25,300 paid in excess of $25 or $50 per session, $24,500 was not for counseling services.

As to the $24,500, Respondent did not overtly threaten or coerce BR into making the payments, and there is some question precisely what was intended by BR in making the large payments, although they clearly not for services rendered by Respondent. Whether or not the Respondent knowingly caused undue pressure on BR, or intended to create a dependency on him, the "donations" arose out the counseling relationship, and BR thought she was "helping."

The Respondent admits and the record mandates a finding that $24,500 in payments from BR were not for counseling services. The relationship of counselor-client existed at all times when payments were made from BR to Respondent.

In March of 1992 the payments from BR to Respondent were disclosed by BR to her sister, when BR admitted to her sister that she had purchased, or supplied the money for the purchase of the Respondent's new van. BR's sister was alarmed by the enormity of the payment, whereupon she alerted her husband and the minister of BR's church, Scott Nelson. Thereafter, BR's sister, brother-in-law and Scott Nelson confronted Respondent, and a meeting was held at Respondent's office to discuss the sizeable payments from BR. The evidence is clear that the individuals confronting Respondent were extremely upset; however, nothing was really accomplished at the meeting.

The $24,500 has not been refunded or returned to BR. Respondent's witness Jeffery Pogue testified that one of the conditions he established in agreeing to testify for Respondent was that Respondent had to be willing to refund "every dime", and he indicated that Respondent had agreed. However, there is no evidence that Respondent ever actually offered to refund the money. BR denied that Respondent offered to return the money when confronted by her sister and brother-in-law. BR was noncommittal when asked by State counsel whether she wanted it returned. Her exact words when asked if she wanted Respondent to give the money back were: "Part of me does, and part of me

doesn't. I'm kind of ambivalent on it." She did concede when asked by State's counsel that she is experiencing some financial need at this time. It is clear from the record that BR's financial condition is not such that she can now afford, or could afford at the time the contributions were made, $25,000. BR is currently unemployed, receives a State of Idaho payment for her disability, apparently as a result of her emotional condition, and is concerned about having enough money in the future to live on. The Respondent professes concern about BR, and testified that he always acted in BR's best interests, even after hearing the testimony about BR's current economic situation. Respondent's professed concern for BR, as opposed to his own well-being and interests, sharply undermines his credibility.

The dual relationship.

BR is a vulnerable and dependent individual and sought counseling from Respondent to deal with her psychological problems. She has a long history of psychotherapy with a large number (albeit an undisclosed number) of prior counselors. The evidence is somewhat conflicting as to whether the counseling relationship with Respondent ever ended. Even though BR's family urged her to discontinue the relationship, and BR grudgingly concedes she ceased counseling with Respondent in March 1992, Respondent's progress notes indicate counseling sessions in June 1992, and Respondent testified that a counseling relationship still exists. Based upon the foregoing, the counseling relationship between Respondent was never finally terminated, it

continues still, and it existed at all times when payments were made from BR to Respondent.

It is difficult to ascertain precisely how the Respondent views his relationship with BR, whether counselor-client or friend, or a combination of the two. BR's view of the relationship is also nebulous. While she states that she was forced to terminate her relationship with Respondent in March, 1992, she still saw him in counseling sessions and made another "donation" in June 1992. BR also urged the Board not to revoke the license of Respondent and is concerned for his professional well-being.

There was never a clearly defined boundary between Respondent and BR in terms of client or friend or some other relationship. Respondent maintained and continues to maintain a dual relationship with BR.

Respondent had no intent to harm BR, has not acted in bad faith, and although he testified that he always acted in her best interests, he clearly has not. The essence of the State's complaint regarding the dual relationship is that the Respondent did not maintain definitive boundaries between himself and BR. By maintaining the dual relationship, Respondent could not be objective and consider the client's interests ahead of his own personal interests and concerns.

The State's expert witness Timothy Furness explained the problems that arise when a counselor maintains a dual relationship with a client as well as the resultant problems from

not having a fee structure. Dual relationships present the potential for conflicts of interest where the client's concern is not foremost, and this is the primary concern of the ethical standards governing counselors. Therapist objectivity is important to the well-being of the client, and when a friendship relationship exists contemporaneously with a counseling relationship, objectivity is jeopardized. In a friendship relationship, needs and desires are expressed between the friends, ideally on a 50/50 basis. In a therapeutic relationship, the needs and desires of the therapist are not expressed to the client; however, in a mixed or dual role, as between Respondent and BR, that can and does occur.

Respondent expressed his business needs and financial plight to BR and, by allowing his needs to enter the relationship, objectivity was forsaken. This finding is mandated by the overwhelming evidence: there is simply no way to determine that BR's contributions to Respondent were in her best interests, given BR's emotional and financial situation, and given that payments exceeding $25,000 from her inheritance were made to Respondent to keep his business afloat and to provide for his personal needs. The Respondent's own progress notes with BR document his own personal concerns. The payments clearly were not made for counseling services. The payments resulted, in part, from BR's need to insure that her counselor could continue to provide services. While this was not verbalized as such by BR, it is evident from the record, as well as from BR's

concessions that she wanted to "help" Respondent. The $24,500 payments were clearly not part of a fee structure since the Respondent has none, the payments were in excess of the initially agreed upon $25 per hour, and the payments cannot be rationally related to the value of the services provided.

A fundamental precept for counselors is to do no harm. Dual relationships create the risk of harm for clients. In a therapeutic setting, the client expects, and is entitled to receive from the therapist, his undivided attention. In a friendship role, when the therapist's personal needs (e.g., financial woes, tax arrears, or the need for a new vehicle) are injected into the relationship, confusion results in the mind of both the therapist and the client. Due to the power imbalance in the professional relationship, there is then considerable risk of harm to the client. In this case, when BR began bailing Respondent out of his tax debt, helped him pay his personal obligations, and extricated him from his financial dilemma, Respondent could not have been considering, and did not consider BR's best interests.

The requirement for an established fee structure.

A counselor is required to have an established fee structure, and while Respondent's system of donations may appear to be benevolent and even aid in the availability of counseling services for the poor, there are inherent and unsolvable problems presented for the client, as is unfortunately demonstrated in this case.

BR testified that the $24,500 in contributions were voluntary on her part and that she felt no pressure from Respondent. BR also conceded that she has an "underlying desire to please people and do nice things for them. And there's probably overtones of, if I do this, then they will like me." BR also conceded that she had some fear that Respondent would be unable to continue counseling her if he didn't receive additional money into his business. The Respondent's actions are particularly vexing in light of that testimony about how BR sees herself, and the probable reasoning underlying the donations: so that Respondent would like her and continue as her counselor.

One of the State's witnesses provided an excellent metaphor which demonstrates what little probative value the "voluntary" nature of the contributions have to this proceeding. Tim Furness stated that if a female client came into his office, disrobed, and requested a sexual encounter with him, the fact that the client requested the conduct does not alter the fundamental ethical prohibition from such a relationship, and such is the case with BR's seemingly voluntary payments to Respondent. There is one sharp distinction between the foregoing hypothetical situation and what occurred with BR that makes the situation even worse: in this case, Respondent had explained *his* financial needs and the necessity of receiving additional funds, which essentially amounted to requests by him, as opposed to the client. Had it been otherwise, there would have been no reason for the Respondent to disclose his impecuniosity to BR.

At the very least, in his role as therapist the Respondent should have refused all funds which were not payment for counseling services--at least $24,500. Then he should have attempted to work with BR, in a *counseling* role, as to what might have been underlying BR's offers of largesse, if in fact BR's offers were benevolent gestures and not the result of subtle coercion.

CONCLUSIONS OF LAW

1. The Idaho State Counselor Licensing Board has jurisdiction and authority to conduct the hearing and consider the revocation of Respondent's license pursuant to Title 54, Chapter 32, Idaho Code.

2. The Respondent did not have an established fee schedule as required by I.C. § 54-3407(5) and the American Association for Counseling and Developmental Ethical Standards A(5), which provides:

> In establishing fees for professional counseling services, members must consider the financial status of clients and locality. In the event that the established fee structure is inappropriate for a client, assistance must be provided in comparable services of acceptable cost.

In this locality, the standard hourly charge for counseling services by licensed counselors is $70 per hour. In this case, once the Respondent abandoned the $25 and later the $50 per session arrangement for services, there was no fee structure whatsoever, and the Respondent accepted money that was not for counseling purposes. Respondent violated I.C. § 54-3407(5) and

the American Association for Counseling and Developmental Ethical Standards A(5). The $24,500 paid by BR to Respondent was not for counseling services, but even if it was, the amounts would be incredibly exorbitant and inappropriate for the client since it would pay for 350 hours of counseling at the community standard rate $70 per hour, or the equivalent of almost *seven years* of weekly one-hour counseling sessions. Here, BR's sessions with Respondent only covered a little more than two months before the $24,500 was paid.

3. The American Association for Counseling and Developmental Ethical Standards A(8) is as follows:

> In the counseling relationship, the counselor is aware of the intimacy of the relationship and maintains respect for the client and avoids engaging in activities that seek to meet the counselor's personal needs at the expense of the client.

Section A(10) provides:

> The member avoids bringing personal issues into the counseling relationship, especially if the potential for harm is present. Through awareness of the negative impact of both racial and sexual stereotyping and discrimination, the counselor guards the individual rights and personal dignity of the client in the counseling relationship.

By explaining his personal financial problems, whether elicited by the client or not, by accepting large sums of money not for counseling purposes, by devoting counseling time to discussion of Respondent's own personal and business needs, by accepting exorbitant sums of money that BR could not afford to donate given her emotional and employment status, by not

counseling BR or referring her to a competent counselor to deal with her willingness to donate tens of thousands of dollars to Respondent, he engaged in a dual relationship, fostered his own welfare, and helped meet his personal needs at the expense of his client, BR, in violation of I.C. § 54-3407(5) and the American Association for Counseling and Developmental Ethical Standards A(8) and A(10).

4. American Association for Counseling and Developmental Ethical Standards B(13) provides in part:

> . . . Dual relationships with clients that might impair the members' objectivity and professional judgment (e.g. as with close friends or relatives), must be avoided and/or the counseling relationship terminated through referral to another competent professional. . .

Respondent initiated and maintained (and for that matter still maintains) a personal relationship with BR. This does not mean that a counselor cannot ever be friends with a client under any circumstances, as that could have a damaging impact on counselors and clients in smaller communities where contact outside the therapeutic sessions is inevitable, or in cases where there is no risk of the counselor losing the required professional impartiality. The ethical standard is directed toward those relationships where the counselor's objectivity and professional judgment may be affected, which is profoundly demonstrated in this case. The dual relationship was evidenced by the admissions of Respondent and statements by BR, and was not really even contested by Respondent at hearing. The Respondent's objectivity

and professional judgment was severely impaired by his discussing his personal life and finances with BR, accompanying her to lunch and dinner, discussing possible travel plans and attending concerts together and ultimately his acceptance from BR of $24,500 in excess of fees for counseling services. Respondent did not attempt to refer BR to another qualified professional. As previously stated, perhaps the most striking evidence of Respondent's lack of professional objectivity is his statement at the hearing that his primary concern was, and still is, BR's best interests; testimony that the hearing officer finds incredible.

5. Respondent alleges that the applicable Ethical Standards are unconstitutionally vague and allow arbitrary and capricious enforcement. The hearing officer lacks the authority to address this argument. I.D.A.P.A. 04.11.01.415, Rule 415 of the Idaho Attorney General's Model Rules of Practice and Procedure. Accordingly, Respondent may present this argument in a proceeding before the District Court.

RECOMMENDED DECISION AND ORDER

Based upon the foregoing, the hearing officer recommends to the Board that Respondent's professional counseling license be revoked.

This is a recommended order of the hearing officer. It will not become final without action of the Board. Any party may file a petition for reconsideration of this recommended order with the hearing officer issuing the order within fourteen (14) days of the service date of this order. The hearing officer issuing this

recommended order will dispose of any petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243 (3), Idaho Code.

Within twenty-one (21) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position on any issue in the proceeding.

Written briefs in support of or taking exceptions to the recommended order shall be filed with the hearing officer. Opposing parties shall have twenty-one (21) days to respond. The hearing officer may schedule oral argument in the matter before issuing a final order. The Board will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The hearing officer or Board may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

Dated this 5th day of April, 1994

Wes L. Scrivner, Hearing Officer

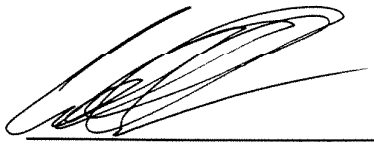
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of April, 1994, true and correct copies of the foregoing document were served upon:

Samuel A. Hoagland
ATTORNEY AT LAW
2309 Mountain View Drive, Suite 205
Boise, ID 83706

Nicole S. McKay
DEPUTY ATTORNEY GENERAL
State of Idaho
Statehouse, Room 210
Boise, ID 83720-1000

_____ by U.S. Mail
__✓__ by Hand Delivery
_____ by Facsimile
_____ by Overnight Mail



Wes L. Scrivner